IN THE LEGAL LIMBO? CONSTITUTIONAL DEBATES ON THE RECOGNITION OF THE ARMENIAN GENOCIDE IN FRANCE

Thomas Hochmann
University of Paris Nanterre, Paris, France

Abstract

This paper revisits the legal debates surrounding the recognition of the Armenian Genocide by the French Parliament through the Law of 29 January 2001, as well as the recent challenges brought against this statute. Opponents of this and similar laws have focused heavily on the purported lack of "normativity," arguing that the Constitution permits only statutes that command or prohibit, not those that merely make declarative statements – such as recognizing a historical event as genocide. The paper advances three main arguments:
(1) it is far from evident that the 2001 law recognizing the Armenian Genocide lacks normative value;
(2) even if a statute were non-normative, this would not necessarily render it unconstitutional; and
(3) should such a law be deemed unconstitutional, it would nonetheless remain in a state of "legal limbo," since its non-normative character precludes any concrete legal consequences.

Keywords: constitutional law; Constitutional Council; France; denial; normativity

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Introduction

Over the past twenty years, debates surrounding the Armenian Genocide in France have generated two distinct constitutional controversies. The first, and more widely discussed, concerns non-recognition, specifically, the denial of the genocide and the question of whether such denial can or should be criminalized.[1] The French Parliament's repeated attempts to legislate on this matter have been struck down by the Constitutional Council, which is charged with ensuring that statutes conform to the French Constitution.[2] This article, however, addresses the second and less-examined controversy: the issue of recognition itself. France formally recognized the Armenian Genocide through the Law of 29 January 2001,[3] a statute that has since become the subject of constitutional debate. During the parliamentary deliberations preceding its adoption, opponents advanced two principal objections. The first was diplomatic, claiming that such recognition would hinder efforts toward lasting peace in the South Caucasus. The second was constitutional, asserting that the French Constitution does not empower Parliament to recognize a genocide.[4]

Part I of this paper examines the arguments advanced in support of the claim that the recognition statute is unconstitutional. While most of these arguments prove unconvincing, one, invoking the so-called requirement of "normativity" in parliamentary statutes, has gained some traction in judicial reasoning and will be explored in Part II. Part III investigates whether a law recognizing a genocide can truly be considered devoid of normative content, concluding that such a view is, at best, debatable. Part IV demonstrates that the Constitutional Council nevertheless appeared to endorse this reasoning in a decision concerning a law on genocide denial. Finally, Part V argues that if the recognition law were to be deemed unconstitutional on the grounds of lacking normativity, it would exist in a state of "legal limbo," a paradoxical situation in which its very non-normative nature both renders it unconstitutional and precludes any practical consequences, including its repeal.

The Case for Unconstitutionality

Under the 1958 Constitution of the French Fifth Republic, Parliament exercises an "attributive competence," meaning it may legislate only within areas explicitly assigned to it by the Constitution. Matters not granted to Parliament fall within the "residual

1 Sévane Garibian, "Taking Denial Seriously: Genocide Denial and Freedom of Speech in French Law," *Cardozo Journal of Conflict Resolution* 9 (2008): 479-488; *Genocide Denial and the Law*, edited by Ludovic Hennebel and Thomas Hochmann (Oxford, New York: Oxford University Press, 2011); *L'extension du délit de négationnisme*, edited by Thomas Hochmann and Patrick Kasparian (LGDJ, 2019).

2 Constitutional Council, decision no. 2012-647 DC of 28 February 2012.

3 Law no. 2001-70 of 29 January 2001 recognizing the Armenian Genocide of 1915.

4 For an analysis of parliamentary debates, see Jérôme Nossent, "La reconnaissance du génocide arménien par les parlementaires français de 1998 à 2001," *Cahiers Mémoire et Politique* 7 (2019). See also Jérôme Nossent, *Les parlementaires et le génocide arménien de 1915* (PhD thesis, University of Liège, 2023); Olivier Masseret, "La reconnaissance par le Parlement français du génocide arménien de 1915," *Vingtième Siècle* 73 (2002): 139-155.

competence" of the executive branch. Within this constitutional framework, critics of the Law of 29 January 2001, recognizing the Armenian Genocide, argued that Parliament lacked the authority to enact such a measure.

One strand of this argument sought to give a legal form to a political objection, claiming that recognition of the Armenian Genocide constituted an act of diplomacy, thereby intruding upon the executive's prerogatives in international affairs. Although this interpretation was momentarily popularized by the eminent jurist Georges Vedel,[5] this idea is hardly convincing. Parliament certainly has limited powers in international matters: it does not negotiate treaties but merely ratifies them, it does not decide on the intervention of armed forces, etc. But a law does not encroach on the "reserved domains" of the President of the Republic or the Government for the sole reason that it displeases a foreign State. Parliament's international powers are indeed limited: it ratifies but does not negotiate treaties, and it authorizes but does not command military interventions. Yet a law does not infringe upon executive competences merely because it displeases a foreign state. By this logic, one could have argued that the 1975 law decriminalizing abortion,[6] which provoked strong opposition from the Vatican, was unconstitutional, an argument that, quite tellingly, no one ever made.

A second line of argument claimed that by recognizing the Armenian Genocide, Parliament had encroached upon the jurisdiction of the courts. This view was articulated during the parliamentary debates preceding the adoption of the Law of 29 January 2001, most notably by Senator Jacques-Richard Delong (Haute-Marne), who asserted in December 2000: "In the face of criminal conduct, the establishment of the facts and their legal assessment do not belong to Parliament. Parliament limits itself, and this is all the better, to defining the nature of crimes and setting the terms of their punishment. It never replaces the courts."[7]

This argument was particularly emphasized during the 2011–2012 parliamentary debate on a law aimed at prohibiting the contestation of the existence of the Armenian Genocide.[8] A widely circulated op-ed by the distinguished jurist Robert Badinter, asserting that "Parliament is not a court," significantly contributed to the spread of this notion.[9] According to the former President of the Constitutional Council, the Constitution prevents

5 Georges Vedel, ''Les questions de constitutionnalité posées par la loi du 29 janvier 2001," in *François Luchaire, un républicain au service de la République*, edited by Didier Maus and Jeannette Bougrab (Publications de la Sorbonne, 2005), 47 f.

6 For an anthology of the parliamentary debates on the so-called "Veil law" of 17 January 1975 that decriminalized abortion, see *La loi Veil sur l'avortement,* edited by Stéphanie Hennette-Vauchez and Thomas Hochmann (Dalloz, 2025).

7 Senate, session of 7 November 2000, available at https://www.senat.fr/seances/s200011/s20001107/sc20001107081.html, accessed 13.06.2024.

8 This statute (*Loi visant à réprimer la contestation de l'existence des génocides reconnus par la loi*) was adopted by the French Parliament on 23 January 2012 but was struck down by the Constitutional Council on 28 February 2012 (Decision No. 2012-647 DC of 28 February 2012). The official record of the parliamentary debates is available at https://www.assemblee-nationale.fr/13/dossiers/lutte_racisme_genocide_armenien.asp.

9 Robert Badinter, ''Le Parlement n'est pas un tribunal," *Le Monde*, 15 January 2012.

Parliament from "substituting itself for a national or international jurisdiction to decide that a crime of genocide was committed at a given time and in a given place."

However, the role of judges is not to *decide* whether a crime occurred, but rather to determine whether the individuals prosecuted are guilty of such a crime and, if so, to impose an appropriate sentence. A law recognizing a genocide does not perform this judicial function. As one author observed with regard to the decision by which the International Criminal Tribunal for Rwanda took judicial notice of the genocide perpetrated against the Tutsi,[10] the acknowledgment that a genocide occurred does not make it more likely that a particular defendant is guilty of participation in it.[11] In a criminal proceeding, the conduct of the accused must always be individually established, and the recognition of the genocide does not impede the court from doing so.

The same reasoning applies to other legal contexts where the recognition of genocide might appear relevant. Even if a law prohibits the approval of a genocide (as is the case in French law[12]) or the denial of a genocide recognized by law (which was nearly enacted in France[13]), it remains the duty of the judge to assess whether the statements under prosecution constitute the offense in question – namely, whether they approve of or deny the recognized genocide.

A related, and even more ambiguous, criticism asserts that Parliament has no authority over history. According to this view, history constitutes a reserved domain into which the legislature has no right to intervene. This seemingly appealing idea has been propagated by many historians; however, Marc-Olivier Baruch has convincingly exposed its conceptual weaknesses.[14] From the perspective of constitutional law, which is of particular relevance here, this argument proves equally unconvincing. "Parliament has not been given the power by the Constitution to tell history. It is up to historians, and to them alone, to do so," wrote Robert Badinter in the aforementioned article.[15] Yet the French Constitution likewise makes no reference to combating terrorism or to the protection of animals. It nevertheless entrusts Parliament with broad legislative powers, enabling it to act in numerous fields not expressly mentioned in the constitutional text. For instance, Parliament is competent to regulate the exercise of freedom of expression,[16] and the

10 ICTR, *Prosecutor v. Karemera et al*., ICTR-98-44-AR73(C), 16 June 2006, para. 33-38.

11 Kevin Jon Heller, "Prosecutor v. Karemera," *American Journal of International Law* 101 (2007): 159 f. See also Paul Behrens, "Between Abstract and Individualized Crime: Genocidal Intent in the Case of Croatia," *Leiden Journal of International Law* 28 (2015): 927.

12 Law of 29 July 1881 on Freedom of the Press, Article 24.

13 A statute was voted but struck down by the Constitutional Council, decision no. 2012-647 DC of 28 February 2012.

14 Marc Olivier Baruch, *Des lois indignes ? Les historiens, la politique et le droit* (Tallandier, 2013). On this topic see also Boris Adjemian, "Le débat inachevé des historiens français sur les 'lois mémorielles' et la pénalisation du négationnisme : retour sur une décennie de controverse," *Revue arménienne des questions contemporaines* 15 (2012) : 9-34.

15 Robert Badinter, ''Le Parlement n'est pas un tribunal," *Le Monde*, 15 January 2012.

16 Article 11 of the *Declaration of the Rights of Man and of the Citizen* (1789) provides: "The free communication of ideas and opinions is one of the most precious rights of man. Any citizen may therefore speak, write,

prohibition of genocide denial, against which the same objection has often been raised, falls squarely within this scope of legislative authority.

Most arguments advanced against the legal recognition of the Armenian Genocide are, therefore, unconvincing. Yet another objection has been raised, one that may appear trivial at first glance, but which ultimately became the principal and most significant constitutional argument invoked against the 2001 law.

The "Normativity" Requirement of Legal Statutes

With regard to the recognition of the genocide, the strongest argument for unconstitutionality lies not so much in the historical field into which the legislature intrudes, but rather in the *manner* in which Parliament acts, or, more precisely, in the manner in which it fails to act. According to this reasoning, a parliamentary statute cannot merely acknowledge the existence of a crime; it must prohibit, permit, or prescribe certain conduct. In other words, a statute must establish a normative rule. This argument, concerning the alleged absence of "normativity" in the parliamentary act, emerged early in the debates surrounding the recognition of the Armenian Genocide and would go on to become the central constitutional objection in subsequent discussions.

This argument was already articulated, for instance, by Senator Delong at the end of 2000 during the Senate debate on the recognition law (the Senate being the upper chamber of the French Parliament). He stated: "A law must have effects within the country. The bill is limited to recording facts outside the territorial jurisdiction of the French Parliament. It does not draw any consequences from them in the internal legal order."[17] An attentive reader might be surprised to encounter such an argument from the same senator who, as noted above, had criticized the law for usurping judicial authority. How can a law simultaneously substitute itself for judges and yet produce no legal effect? Such contradictions are, in fact, common in debates concerning so-called "non-normative laws."

The most striking example appears in an article by two law professors who argued that the so-called "memorial laws" were unconstitutional both because they lacked normativity and because they restricted freedom of expression, that is, because they prohibited nothing and, paradoxically, prohibited too much: "They are unconstitutional not only because they are devoid of normative effects, but also because, by their very nature, they unduly restrict freedom of expression."[18] This widespread and deliberate contradiction would later prove

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and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by law." Similarly, Article 34 of the *Constitution of the French Republic* (4 October 1958) states: "Statutes shall determine the rules concerning civic rights and the fundamental guarantees granted to citizens for the exercise of their civil liberties."

17 Senate, session of 7 November 2000, available at https://www.senat.fr/seances/s200011/s20001107/sc20001107081.html.

18 Anne Levade and Bertrand Mathieu, "Le législateur ne peut fixer des vérités et en sanctionner la contestation," *Semaine Juridique JCP G* 14 (2012): 425.

crucial in the legal debate over the prohibition of genocide denial. For now, however, let us focus on the argument concerning the absence of normativity.

Upon reflection, the significance attributed to this criticism may appear surprising: a law that neither commands nor forbids anything would not, at first glance, seem capable of provoking serious concern. Yet there are several explanations for the wide resonance this argument has found among members of Parliament and legal scholars alike. For politicians, the invocation of "normativity" conveniently lends a veneer of legal legitimacy to objections that are, in truth, motivated by considerations of a different nature. It is undoubtedly easier to oppose the recognition of the Armenian Genocide on ostensibly constitutional grounds, than to admit opposition based on electoral, economic, or diplomatic calculations. A candidate seeking office will, quite naturally, prefer to claim that his hands are tied by a constitutional constraint rather than to acknowledge that he resists recognition of the Armenian Genocide for fear of alienating the Turkish government.

Among legal experts, the argument of a lack of normativity readily integrates into a broader discourse on the so-called "crisis of the law," itself echoing the ever-seductive declinist refrain that "things were better in the past."[19] No one articulated this sentiment more vividly than Pierre Mazeaud, President of the Constitutional Council, in a 2005 speech in which he denounced the rise of non-normative legislation. "This way of softening the law with general considerations and pious wishes is a modern phenomenon," he observed. Giving free rein to what he called his "sacred anger" against these "chatty laws" (*lois bavardes*), Mazeaud declared that the Constitutional Council would henceforth consider such texts to be contrary to the Constitution.[20]

The Constitutional Council applied this reasoning only a few months later, in its review of a provision of the *Orientation and Program Law for the Future of Schools*, which contained several platitudinous statements: "The objective of the school is the success of all students. Given the diversity of students, the school must recognize and promote all forms of intelligence to enable them to develop their talents," and so forth.[21] The Council declared the provision unconstitutional, relying on the legal reasoning articulated earlier by President Mazeaud in his 2005 speech.[22]

The first argument, however, is not particularly convincing. It is grounded in Article 6 of the *Declaration of the Rights of Man and of the Citizen* (1789), which provides that "the law is the expression of the general will."[23] From this, Mazeaud inferred that the vocation

19 David Fonseca, "La métaphysique des constitutionnalistes. Analyse généalogique du discours doctrinal sur la crise de la loi," *Archives de philosophie du droit* 54 (2011), 309 f.

20 New Year's greetings from the President of the Constitutional Council, Pierre Mazeaud, to the President of the Republic, 3 January 2005, available on the website of the Constitutional Council, www.conseil-constitutionnel.fr. In this speech as in the forthcoming quotes from the 1958 Constitution or the 1789 Declaration of the Rights of Man and of the Citizen, "the law" means a statute enacted by the Parliament (in French: "*la loi*") and not a set of legal rules, as when one speaks of "French law" or "criminal law" (in French: "*le droit*.")

21 Constitutional Council, decision no 2005-512 DC of 21 April 2005, para. 16 and 17.

22 New Year's greetings from the President of the Constitutional Council, Pierre Mazeaud, to the President of the Republic, 3 January 2005.

23 *Declaration of the Rights of Man and of the Citizen* (1789), Article 6.

of the law is "to set out norms."[24] Yet he did not explain how such a conclusion follows. Why should the general will be expressed only through normative rules?

The second argument appears more compelling. It rests on the observation that all functions assigned to Parliament by the Constitution are inherently normative: the law "regulates," "sets the rules," "determines the principles," or "defines the limits" of freedoms. The only exception identified by the President of the Constitutional Council lies in Article 1 of the Constitution, which, since the 1999 amendment, provides that "the law shall promote equal access for women and men to elective offices and professional responsibilities."[25]

Is the Law Recognizing the Armenian Genocide Devoid of Normativity?

Let us concede, for the sake of argument, that a law devoid of any normative content would be contrary to the Constitution. The question that then arises is whether the law of 29 January 2001, which recognizes the Armenian Genocide, is in fact devoid of normativity. One could challenge this assumption by asserting that the law may nonetheless produce certain practical effects: its official recognition of the genocide might, for instance, discourage denial, promote education, or encourage commemoration. However, such consequences do not correspond to the conception of normativity reflected in the relevant constitutional provisions. To determine whether a law "sets rules" or "establishes principles," one must examine not its potential effects but its textual content. The inquiry, therefore, concerns the letter of the law, whether it enacts a prohibition, grants a permission, or imposes an obligation. From this standpoint, a law that merely recognizes a genocide must indeed be regarded as devoid of normativity.

Or at least, that is the case if the statute is considered in isolation. A second way to challenge the alleged absence of normativity is to observe that legal norms are not necessarily contained within a single provision; rather, they may arise from the interaction of several related statements. The Danish legal theorist Alf Ross famously illustrated this with the example of a Pacific tribe that held two beliefs: first, that anyone who sleeps with their mother-in-law is *tû-tû*; and second, that anyone who is *tû-tû* must undergo a purification ceremony. Only by combining these two statements does the underlying norm become apparent, namely, that anyone who sleeps with their mother-in-law must be subjected to a purification ceremony.[26]

By analogy, if the 2001 law is examined in conjunction with other legislative provisions, it may be possible to identify a normative dimension. At the time of its enactment, Article 24 of the Law of 29 July 1881 criminalized the public expression of approval of crimes against humanity, while the Criminal Code defined genocide as such a crime. Accordingly, one could argue that the recognition of the Armenian Genocide

24 New Year's greetings from the President of the Constitutional Council, Pierre Mazeaud, to the President of the Republic, 3 January 2005.

25 Ibid.

26 Alf Ross, "Tû-Tû," *Harvard Law Review* 70 (1957): 812.

implicitly gave rise to a normative rule: the prohibition of public apology of the Armenian Genocide.

However, not everyone accepts this systemic or "global" interpretation of the legal order. The French Court of Cassation, the highest court for civil and criminal matters, demonstrated this point emphatically in 2013. The case concerned statements made on television by a businessman from Martinique regarding slavery:

> Historians exaggerate the problems a little. They talk about the bad sides of slavery, but there are good sides too. This is where I disagree with them. There were colonists who were very humane with their slaves, who freed them, who gave them the opportunity to have a career. […] When I see mixed-race families, well, white and black, the children come out in different colors, there is no harmony. There are some who come out with hair like mine, others who come out with frizzy hair, in the same family with different skin colors – I don't think that's right. The idea was to preserve the race.[27]

These remarks, reminiscent of another era, earned their author a conviction for the offense of approving crimes against humanity, as defined in Article 24 of the Law of 29 July 1881. Slavery is indeed recognized as a crime against humanity, and it would seem self-evident that the statements in question amounted to its condonation. The trial judges, however, made the mistake of referring in their decisions to the Law of 21 May 2001, which recognizes that the slave trade and slavery "perpetrated from the fifteenth century onwards, in the Americas and the Caribbean, in the Indian Ocean and in Europe, against African, Amerindian, Malagasy, and Indian populations," constitute crimes against humanity.[28]

However, as the Court of Cassation explained, the Law of 21 May 2001 "cannot be vested with the normativity attached to statutes and [therefore cannot] constitute one of the constituent elements of the offence of approving a crime against humanity."[29] The reference to this 2001 law by the Court of Appeal thus justified the annulment of its decision. According to the Court of Cassation, the absence of normativity is an absolute condition: a non-normative statement cannot be combined with a prohibition to create a norm. This remarkable 2013 judgment, which ultimately prompted Parliament to explicitly criminalize the public approval of slavery,[30] can be understood only in light of a decision rendered a year earlier by the Constitutional Council.

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27 Court of Cassation, criminal chamber (cass. crim.), *Huyghues-Despointes*, no. 11-85909 (5 February 2013).

28 Law no. 2001-434 of 21 May 2001 recognizing slave trade and slavery as crimes against humanity.

29 Court of Cassation, criminal chamber (cass. crim.), *Huyghues-Despointes*, no. 11-85909 (5 February 2013).

30 Law no. 2017-86 of 27 January 2017, amending Article 24 of the Law of 29 July 1881 on Freedom of the Press. On this question, see Thomas Hochmann, "Reconnaissance, apologie et négation de l'esclavage," in *La prohibition de l'esclavage et de la traite des êtres humains*, ed. Fabien Marchadier (Pedone, 2022), 81-91.

Recognition, Denial, and the Constitutional Council

Even assuming that a lack of normativity renders a law unconstitutional, such a defect is hardly of the utmost gravity. There are undoubtedly greater legislative flaws than statutes that neither command nor prohibit anything. Thus, the declaration of unconstitutionality pronounced in 2005 under the presidency of Pierre Mazeaud remained an isolated instance.[31] Both before and after that decision, the Constitutional Council generally chose to disregard non-normative provisions.[32] On other occasions, it explicitly held that the absence of normativity could not be "usefully" invoked as a ground of unconstitutionality, meaning that it was not for the Council to draw any consequence from it.[33] It was only in 2023 that the Constitutional Council once again declared a law unconstitutional on this basis. The statute in question merely provided that the State "shall promote, through its action, projects for the production of renewable marine energy."[34] The Council found that this provision lacked any normative content and was therefore unconstitutional.[35]

In the meantime, however, the requirement of normativity in statutory law had been the subject of a reminder particularly relevant to our discussion. In 2012, the Constitutional Council was called upon to examine a statute that sought to prohibit the contestation of the existence of a "genocide recognized by law." Beneath this somewhat convoluted formulation, the French Parliament clearly intended to criminalize the denial of the Armenian Genocide. The Constitutional Council declared the law unconstitutional, relying on a line of reasoning that remains, to say the least, difficult to follow.

The Constitutional Council reasoned as follows:

> Considering that a legislative provision having the objective of "recognizing" a crime of genocide would not itself have the normative scope which is characteristic of the law; that nonetheless, Article 1 of the law referred punishes the denial or minimisation of the existence of one or more crimes of genocide "recognised as such under French law"; that in thereby punishing the denial of the existence and the legal classification of crimes which Parliament itself has recognised and classified as such, Parliament has imposed an unconstitutional limitation on the exercise of freedom of expression and communication.[36]

31 Constitutional Council, decision no 2005-512 DC of 21 April 2005, para. 16 and 17.

32 See for instance Constitutional Council, decision no. 2012-657 DC of 29 November 2012.

33 See for instance Constitutional Council, decision no. 98-401 DC of 10 June 1998, para. 19.

34 Constitutional Council, decision no. 2023-848 DC of 9 March 2023, para. 55.

35 Ibid., para. 56.

36 Constitutional Council, decision no. 2012-647 DC of 28 February 2012, para. 6 (official translation from the website of the Constitutional Council). Original version: "*Considérant qu'une disposition législative ayant pour objet de 'reconnaître' un crime de génocide ne saurait, en elle-même, être revêtue de la portée normative qui s'attache à la loi ; que, toutefois, l'article 1er de la loi déférée réprime la contestation ou la minimisation de l'existence d'un ou plusieurs crimes de génocide 'reconnus comme tels par la loi française' ; qu'en réprimant*

This (official) translation of the decision may not, however, suffice, since the Constitutional Council's reasoning in this passage borders on the unintelligible. A further interpretive paraphrase may therefore be useful. The Council's reasoning can be reformulated as follows:

1. A law must be normative – that is, it must prohibit, permit, or prescribe a certain behavior.
2. A statute that merely recognizes a genocide does none of these things and is therefore non-normative.
3. The law adopted by Parliament punishes the denial of a genocide recognized by statute. This implies that a law can "recognize" a genocide – an act which itself constitutes unconstitutional behavior, since it amounts to adopting a non-normative law.
4. Consequently, the criminalization of contesting the existence of a genocide recognized by statute is deemed to infringe upon freedom of expression.

The difficulty in understanding this reasoning stems from the seeming implausibility that the Constitutional Council would ground its decision on such logic. The argument appears inherently contradictory: it is paradoxical to base a finding of infringement upon freedom of expression on the *absence* of normativity. How could a law that prohibits nothing be said to violate freedom of expression? In reality, the statute examined by the Council was, quite evidently, normative – it prohibited a specific behavior (the denial of genocide) and attached a penal sanction to it. If the earlier law recognizing the genocide had indeed been devoid of normativity, this defect was effectively remedied by the subsequent statute, which linked that recognition to a criminal prohibition on its contestation.

This decision marked the beginning of a major shift in France's legal approach to combating the denial of crimes against humanity. It gave rise to the widespread impression that if Parliament could not criminalize the denial of a genocide it had itself recognized, then only the denial of crimes recognized by judicial bodies could be sanctioned. This interpretation led to the adoption of a new law in 2017, followed by a Constitutional Council decision,[37] establishing that the denial of all war crimes, crimes against humanity, genocides, and crimes of slavery adjudicated by French or international courts is punishable by law. In short, the denial of all major crimes – except the Armenian Genocide.[38]

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ainsi la contestation de l'existence et de la qualification juridique de crimes qu'il aurait lui-même reconnus et qualifiés comme tels, le législateur a porté une atteinte inconstitutionnelle à l'exercice de la liberté d'expression et de communication."

37 The law adopted by the Parliament was partially ruled unconstitutional by the Constitutional Council, decision no. 2016-745 DC of 26 January 2017. The rest of the law entered into force the following day, making it the Law no. 2017-86 of 27 January 2017.

38 For an analysis of the whole process and its result, see Thomas Hochmann, "Le Conseil constitutionnel et l'art de la suggestion. À propos du critère de la condamnation juridictionnelle du crime nié," in *L'extension du délit de négationnisme*, edited by Thomas Hochmann and Patrick Kasparian (LGDJ, 2019), 37-57.

What is crucial to emphasize is that the Constitutional Council never stated, in its 2012 decision, that only crimes resulting in a judicial conviction could be subject to a legal prohibition of their denial. Rather, the Council merely affirmed that Parliament could not prohibit the denial of a crime that it had itself recognized. And if such an act is unconstitutional, it is not because Parliament lacks the authority to intervene in the historical sphere, but solely because a law recognizing a genocide is, supposedly, devoid of normativity. This reasoning therefore implies the unconstitutionality of the law of 29 January 2001. Yet the foundation of this unconstitutionality places that statute in a peculiar position.

In the "Legal Limbo"

Until 2010, the Constitutional Council had no authority to review statutes that had already entered into force. Judicial review of legislation could occur only *a priori*, that is, after a law had been passed by Parliament but before its promulgation by the President of the Republic. Within this framework, the Constitutional Council could be referred to for review by the Head of State, the Prime Minister, the President of the National Assembly, the President of the Senate, and, since 1974, by sixty deputies or sixty senators.[39]

However, in 2001, although many members of Parliament opposed the law recognizing the Armenian Genocide – and although several invoked its alleged unconstitutionality – there was not a sufficient number of parliamentarians to refer the matter to the Constitutional Council. Perhaps they were deterred by the admonition of Roland Blum, the deputy representing the Bouches-du-Rhône region in southern France, who declared: "I cannot see what arguments these authorities would dare to invoke for such a referral, which would be a dishonor to France."[40]

On 28 February 2012, as explained above, the Constitutional Council ruled that a law recognizing a genocide, such as the Law of 29 January 2001 recognizing the Armenian Genocide, was contrary to the Constitution on the grounds that it was devoid of normativity.[41] However, the Council drew no practical consequences from this observation. Its decision prevented the entry into force of the new law intended to punish the "contestation of the existence of a genocide recognized by law," but it left unaffected the earlier statute recognizing the Armenian Genocide.

A constitutional amendment adopted in 2008 that has come into effect in 2010 introduced the possibility of submitting a statute to the Constitutional Council *after* its entry into force. This form of *a posteriori* review, known as the "priority question of constitutionality" (*question prioritaire de constitutionnalité*, or *QPC*), empowers

39 Constitution of 4 October 1958, Article 61.

40 National Assembly, First session of 18 January 2001, available at https://www.assemblee-nationale.fr/11/cra/2000-2001/2001011809.asp.

41 Constitutional Council, decision no. 2012-647 DC of 28 February 2012.

the Council to strike down any provision it deems unconstitutional. Opponents of the recognition of the Armenian Genocide were quick to invoke this new mechanism, seeking to have the 2001 law annulled on the grounds that, as the Council had stated in 2012, such a statute contravened the constitutional requirement of normativity. Yet matters are not so straightforward: the very reasoning that renders the recognition of genocide unconstitutional simultaneously prevents the 2001 law from being referred to the Constitutional Council. The reason for this paradox merits further explanation.

A statute cannot be challenged directly before the Constitutional Council outside the context of judicial proceedings. As Article 61-1 of the Constitution provides, it is only "during proceedings pending before a court" that a party to the dispute may argue that a law "violates the rights and freedoms guaranteed by the Constitution." Opponents of the recognition of the Armenian Genocide therefore initiated legal actions in order to create procedural opportunities to contest the 2001 law. They proceeded in two distinct ways.

First, an "Association for the Neutrality of the Teaching of Turkish History in School Curricula" was established with the purpose of challenging the decree defining the history and geography curriculum in secondary schools, insofar as it included instruction on the Armenian Genocide. This challenge was dismissed by the supreme administrative court, the Council of State (*Conseil d'État*), which held, in particular, that the curriculum aimed to "teach students the state of knowledge as it results from historical research."[42] Prior to this ruling, however, the case had provided an opportunity to raise a *priority question of constitutionality* against the 2001 law recognizing the Armenian Genocide.

A second strategy pursuing the same objective relied on defamation proceedings. A denier of the Armenian Genocide repeatedly filed defamation suits against individuals who had referred to him as a "denier of the Armenian Genocide." The courts acquitted the defendants, finding that they had sufficient factual basis for their characterization.[43] Yet this litigation also served as a vehicle for introducing a *priority question of constitutionality* challenging the validity of the 2001 law.

These attempts were unsuccessful, and indeed could not have succeeded, for a reason that requires a brief digression into procedural matters. Before a *priority question of constitutionality* (*QPC*) can be submitted to the Constitutional Council, it must pass through a procedural filter. The court hearing the case in which the QPC is raised must first determine whether certain admissibility conditions are met before potentially transmitting the question to either the Court of Cassation or the Council of State – depending on whether the dispute falls within the judicial sphere (between private parties) or the administrative sphere (involving challenges to public authorities). The higher court then conducts a further examination to ensure that the same conditions are satisfied before possibly referring the QPC to the Constitutional Council, which alone holds the authority

42 Council of State (*Conseil d'État*), *Association pour la neutralité de l'enseignement de l'histoire turque dans les programmes scolaires*, no. 392400 (4 July 2018).

43 See among others Tribunal of Paris, 17th chamber, *Gauin v. Toranian* (28 November 2017); Appeal Court of Paris, *Gauin v. Leylekian and Toranian* (6 janvier 2022).

to strike down a statute on the ground that it violates the Constitution.[44]

There is no need here to provide a complete account of the conditions that allow a *priority question of constitutionality* (*QPC*) to pass the procedural filters and reach the Constitutional Council. It suffices to note that these conditions are multiple. They include, among others, determining whether the claim of unconstitutionality appears serious, or verifying that the Constitutional Council has not already ruled the relevant statute to be in conformity with the Constitution. Yet, for our purposes, the first condition is the most decisive.

This initial requirement bars the transmission of QPCs directed against the law recognizing the Armenian Genocide. For a QPC to pass the filters, the contested legislative provision must be *applicable to the dispute*. Although courts tend to interpret this condition broadly, their flexibility has limits: a statute devoid of normativity cannot be "applicable" to anything. If a law neither prohibits, authorizes, nor commands any action, it cannot be applied in the legal sense. Consequently, it cannot serve as the object of a *priority question of constitutionality*. Thus, while the Constitutional Council may hold that a law recognizing a genocide is unconstitutional because it lacks normativity, it is procedurally impossible to submit such a claim to the Council within the framework of a QPC.

The supreme administrative court has expressed this point with particular clarity on two occasions:

> The provisions of a law which are devoid of normativity cannot be regarded as applicable to the dispute, within the meaning and for the application of Article 23-5 of the Ordinance of 7 November 1958. A legislative provision whose purpose is to 'recognize' a crime of genocide has no normativity. Consequently, the provisions of Article 1 of the Law of 29 January 2001 cited above cannot be regarded as applicable to the dispute brought by the Association for the Neutrality of the Teaching of Turkish History in School Curricula. Therefore, without there being any need to refer the priority question of constitutionality invoked to the Constitutional Council, the argument based on the fact that these provisions infringe the rights and freedoms guaranteed by the Constitution must be dismissed.[45]

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44 Constitution of 4 October 1958, Article 61-1; Ordinance of 7 November 1958 constituting an institutional act on the Constitutional Council (*ordonnance portant loi organique sur le Conseil constitutionnel*), Articles 23-2 and 23-5.

45 Council of State (*Conseil d'État*), *Association pour la neutralité de l'enseignement de l'histoire turque dans les programmes scolaires*, no. 392400 (19 October 2015), par. 3: "*Considérant que les dispositions d'une loi qui sont dépourvues de portée normative ne sauraient être regardées comme applicables au litige, au sens et pour l'application de l'article 23-5 de l'ordonnance du 7 novembre 1958 ; qu'une disposition législative ayant pour objet de 'reconnaître' un crime de génocide n'a pas de portée normative ; que, par suite, les dispositions de l'article 1er de la loi du 29 janvier 2001 citées ci-dessus ne peuvent être regardées comme applicables au litige introduit par l'association pour la neutralité de l'enseignement de l'histoire turque dans les programmes sco-*

Conclusion

The alleged unconstitutionality of the law recognizing the Armenian Genocide cannot be grounded in the principles of separation of powers, in any supposed usurpation of judicial or executive authority, or in the claim that Parliament improperly intervened in the domain of history. The only defensible argument concerns the law's alleged lack of normativity. By affirming, in its decision of 28 February 2012, that a statute which merely recognizes a genocide is unconstitutional for this reason, the Constitutional Council effectively placed the 2001 law in a state of legal limbo. The very reason that could render this statute unconstitutional, its absence of normativity, simultaneously prevents its referral to the Constitutional Council, that is, to the only body capable of drawing legal consequences from such unconstitutionality by repealing the law.

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laires ; qu'ainsi, sans qu'il soit besoin de renvoyer au Conseil constitutionnel la question prioritaire de constitutionnalité invoquée, le moyen tiré de ce que ces dispositions portent atteinte aux droits et libertés garantis par la Constitution doit être écarté." See also Council of State (*Conseil d'État*), *Association pour la neutralité de l'enseignement de l'histoire turque dans les programmes scolaires*, no. 404850 (13 January 2017), para. 3.

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About the Author

Thomas Hochmann is Professor of Public Law at the University of Paris Nanterre and a member of the *Centre de Théorie et d'Analyse du Droit* (CTAD). He also serves as Adjunct Research Professor at the Armenian Genocide Museum-Institute. His most recent publication, co-authored with Vincent Duclert and Raymond H. Kévorkian, is *Arménie. Un génocide et la justice* (Les Belles Lettres, 2025).

Email: Thomas.Hochmann@gmail.com
ORCID ID: 0000-0002-5143-1949